No. 42227-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kimlis Tek,

Appellant.

Thurston County Superior Court Cause Nos. 10-1-00807-5,

10-1-00911-0, and 10-1-01957-3 (Consolidated)

The Honorable Judge Carol Murphy

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. TEK INTENDED TO INFLICT GREAT BODILY HARM.

To obtain a criminal conviction, the prosecution is required to prove beyond a reasonable doubt all the elements of an office. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). Here, no evidence in the record proved that Mr. Tek intended to inflict great bodily harm—that is, bodily injury creating a probability of death, causing significant serious permanent disfigurement, or causing a significant permanent loss or impairment of function. RCW 9A.04.110(4)(c); RCW 9A.36.011.

The only direct evidence bearing on Mr. Tek's intent was his statement denying that he'd intended serious harm. RP 77, 115, 192. Relevant circumstantial evidence included the fact that Mr. Tek used a sharp knife to cut a deep 6" wound in his wife's arm—possibly because he was angry that she interfered with his computer use and planned to leave him—and that he'd once previously pointed a gun at her. RP 49, 54, 67, 376-378; *see* Brief of Respondent, pp. 3-5, 6-7 (summarizing relevant evidence). Without explanation, Respondent argues that this evidence was "more than sufficient" for a jury to infer the requisite intent. Brief of Respondent, p. 5.

This is incorrect. Although the jury was free to disregard Mr. Tek's denials and to draw any reasonable inference from the facts, it was not free to invent evidence. Applying this standard to the evidence as outlined by Respondent, the prosecution failed to affirmatively prove that Mr. Tek actually intended to inflict great bodily harm. Under proper circumstances, intent may be inferred from conduct;[1] however, the conduct must actually give rise to the inference of intent. In this case, the mental state required for conviction was intent to inflict not just *harm* or *substantial bodily harm*, but *great bodily harm*.

Respondent correctly but irrelevantly argues the absence of evidence supporting a theory of accident or an assault with the intent to inflict only very minor harm. Brief of Respondent, p. 7. Mr. Tek's sufficiency argument turns on the degree of harm he actually intended, and on the absence of sufficient proof to establish (beyond a reasonable doubt) that he actually intended to inflict great bodily harm.[2]

Neither Mr. Tek's conduct nor any other evidence—even when taken in a light most favorable to the prosecution—gives rise to an inference that he intended specifically to inflict great bodily harm.

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[1] *See, e.g., State v. Varga*, 151 Wash. 2d 179, 201, 86 P.3d 139, 150 (2004).

[2] At trial, he acknowledged that he was guilty of second-degree assault. RP 714-718.

Accordingly, the evidence was insufficient for conviction, and the charge must be dismissed with prejudice. *Smalis* at 144.

II. THE TRIAL JUDGE'S COMMENT ON THE EVIDENCE REQUIRES REVERSAL.

A judicial comment on the evidence is presumed prejudicial, and cannot be deemed harmless except in very unusual circumstances. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). Here, the trial judge unambiguously commented on the evidence when he warned jurors that Exhibit 27 was "somewhat graphic" and advised them that they "may want to look at it quickly or not at all." RP 57.

Although the judge's motivation was understandable, his remarks conveyed his personal opinion to the jury: that the injury inflicted by Mr. Tek was particularly gruesome. This comment went directly to at least one element of the offense—whether or not the injury qualified as great bodily harm. RCW 9A.04.110(4)(c); RCW 9A.36.011. The comment may also have had some bearing on Mr. Tek's mental state.

Furthermore, the judge's advice—to look "quickly or not at all"—conflicted with the court's instruction that jurors consider all the evidence. RP 57; CP 91-92. Without citation to the record, Respondent claims that the judge was concerned only with the magnified image projected on screen in court, and that her advice (to look "quickly or not at all") did not

apply to the photograph that would be available during deliberations. Brief of Responent, p. 10. This argument is not supported by anything in the record. Even if it were true, nothing about the judge's comment made this clear to the jurors. RP 57.

Respondent also claims that the comment "did not go to any contested matter." Brief of Respondent, p. 11. This is not true; as Respondent acknowledges, Mr. Tek "contested that the injury constituted great bodily harm..." Brief of Respondent, p. 10. Furthermore, Respondent's cursory harmless error analysis does not meet the high standard set forth in *Levy*.[3]

The judge's comment on the evidence was error, no matter how well-intentioned. Mr. Tek's conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE TESTIMONY OF DETECTIVES GRIES AND ANDERSON INVADED THE PROVINCE OF THE JURY AND VIOLATED MR. TEK'S RIGHT TO A JURY TRIAL.

No witness may opine that the accused person is guilty. *State v. Black*, 109 Wash.2d 336, 349, 745 P.2d 12 (1987). Even indirect statements violate the right to a jury trial. *Id.* An opinion on an ultimate issue is forbidden if it is a "nearly-explicit" statement that the witness

[3] The *Levy* standard requires the record to affirmatively show that no prejudice could have resulted from the comment. *Levy, at* 725.

believes the accused is guilty. *State v. King*, 167 Wash.2d 324, 332, 219 P.3d 642 (2009).

Here, Detective Gries testified that he "upgraded" the charge to first-degree assault, based on "the severity of the injury that [he] had become aware of during the investigation." RP 247-248. This testimony clearly conveyed his personal belief that the injuries qualified as great bodily harm, and thus violated the prohibition against such testimony. *King, at* 332; *see* Appellant's Opening Brief, pp. 13-17.

In addition, Detective Gries repeatedly provided his opinion that Mr. Tek was guilty of witness tampering. RP 221, 322, 356. His opinion testimony was supplemented by Detective Anderson's. RP 474, 474-475, 480-481, 482. Both detectives provided their interpretation of certain evidence; both opined that the evidence constituted tampering. *See* Appellant's Opening Brief, pp. 13-17.

Respondent's argument that the detectives were merely explaining their actions does not change this. Brief of Respondent, p. 19. There was no justification for introducing testimony that violated the province of the jury and infringed Mr. Tek's right to a jury trial. *King, at* 332.

These errors may be considered for the first time on review under RAP 2.5(a)(3), which permits review of a manifest error affecting a

constitutional right.[4] Respondent argues that the errors are not manifest because they did not prejudice Mr. Tek. Brief of Respondent, pp. 20-22. This is incorrect.

Mr. Tek argued that his wife's injuries did not qualify as great bodily harm, and denied that he'd intended to inflict great bodily harm. RP 540, 571-572, 704-723. The detective's testimony thus related directly to the primary issues at trial. By improperly telling the jury that he thought the injuries qualified as great bodily harm, Detective Gries unfairly tipped the balance in favor of conviction. Thus, Mr. Tek has made a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

The same is true with regard to the tampering charges. Mr. Tek objected to some of the improper opinion testimony; the remainder of the testimony had practical and identifiable consequences at trial. By telling the jury that Mr. Tek was guilty of tampering, Detectives Gries and Anderson increased the likelihood of conviction.

The improper opinion testimony invaded the province of the jury and infringed Mr. Tek's right to a jury trial. *King, supra.* His convictions

[4] The court also has discretion to consider the errors. *State v. Russell,* 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

must be reversed, and the charges remanded for a new trial. *Nguyen, supra.*

IV. THE TRIAL COURT VIOLATED MR. TEK'S DOUBLE JEOPARDY RIGHTS BY ENTERING MULTIPLE VNCO AND WITNESS TAMPERING CONVICTIONS.

Double jeopardy forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010). Multiple convictions may not be based on a single unit of prosecution. *Id.*

A. Mr. Tek committed (at most) only one count of witness tampering.

Here, by attempting to influence his wife, Mr. Tek committed at most one count of witness tampering, under the law as it existed prior to July of 2011. *See* former RCW 9A.72.120 (2010); *Hall, supra.*

This is so even though his attempts to influence his wife may have related to different charges; nothing in *Hall* suggests another result is required. *See Hall, supra*; *see also, e.g., State v. O'Brien*, 164 Wash. App. 924, 928, 267 P.3d 422 (2011) (addressing unit of prosecution for bail jumping involving multiple cause numbers). Nor is it relevant that Mr. Tek's efforts intensified following his arrest in December 2010.[5]

[5] The *Hall* court left open the possibility that a break in time or a change in the means of communication *might* permit additional convictions. *Hall, at* 737. In this case, however, they do not: Mr. Tek's ongoing conduct was (allegedly) directed at influencing his wife not to testify against him. His initial efforts (in 2010) were not resolved by a trial on the first assault charge; the relationship between him (as defendant) and her (as witness) continued until he was convicted in May of 2011.

B. Mr. Tek committed (at most) only 12 counts of VNCO.

A similar analysis governs Mr. Tek's VNCO convictions under RCW 26.50.110. Under the reasoning in *Hall,* one conversation gives rise to a single unit of prosecution, even if it is briefly interrupted. When Mr. Tek continued a single conversation with his wife by calling her right back after the jail's telephone system disconnected them, he committed only one violation. *Hall, supra.* Respondent's contrary argument—that Mr. Tek could be charged each time he dialed the phone—is incorrect. *See* Brief of Respondent, pp. 28-30 (citing *State v. Brown,* 159 Wash. App. 1, 248 P.3d 518 (2010)). There is a difference between the 15-minute breaks forced upon Mr. and Ms. Tek by the jail's telephone system, and the hundreds of calls made by the defendant in *Brown.*

By entering multiple convictions and imposing multiple punishments for a single conversation, the trial judge violated Mr. Tek's double jeopardy rights, even though the conversation was briefly interrupted. Mr. Tek should only have been charged with twelve counts counts. The remaining 24 convictions must be vacated and the charges dismissed. *Id.*

V. MR. TEK WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

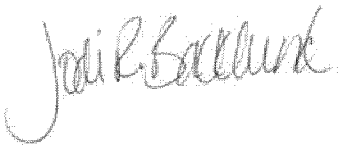
Mr. Tek stands on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Tek's first-degree assault conviction must be reversed and the charge dismissed with prejudice or remanded for a new trial. One of his two tampering charges must be dismissed with prejudice; the other must be remanded for a new trial. Twenty-four of his VNCO charges must be dismissed with prejudice.

Respectfully submitted on April 5, 2012,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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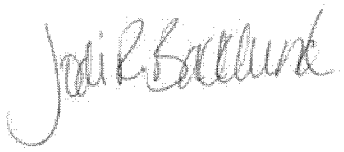
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 5, 2012.



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